STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2005
v	No. 251715 Wayne Circuit Court
RODERICK LAMONT BAILEY, Defendant-Appellant.	LC No. 02-013767-01

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). He was sentenced to a mandatory term of life imprisonment without the possibility of parole for the murder conviction and five to fifteen years' imprisonment for the child abuse conviction. Defendant appeals as of right. We affirm in part and vacate in part.

Defendant argues that his first-degree child abuse conviction should be vacated because his convictions and sentences for both the predicate felony and felony murder constitute double jeopardy pursuant to our Supreme Court's holding in *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981).

The United States and Michigan Constitutions prohibit placing a defendant in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. This prohibition protects against (i) a second prosecution for the same offense after acquittal, (ii) a second prosecution for the same offense after conviction, and (iii) multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).[1] Convictions of felony murder and the

[1] We note the recent change in the law with respect to the "successive prosecutions" strand of double jeopardy. In *Nutt*, *supra* at 567-568, our Supreme Court overruled its decision in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), in which a "same transaction" test [prohibiting serial prosecutions for completely different crimes if they occurred during a single criminal event] was adopted in place of the "same elements" test [prohibiting serial prosecutions for crimes sharing identical elements]. The *Nutt* Court reasoned that the Michigan Constitution was intended to provide the same double jeopardy protection as the Fifth Amendment, and it adopted

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predicate felony violate the prohibition against double jeopardy. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993); *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Coomer, supra* at 224. Accordingly, we vacate defendant's conviction and sentence for first-degree child abuse.

Defendant next argues that he is entitled to a new trial because the trial court's instructions regarding first-degree child abuse were inconsistent.[2] Defendant maintains that the instruction on first-degree child abuse, as it related solely to the felony-murder instruction, was inadequate because it failed to include a discussion of specific intent pursuant to CJI2d 3.9. We disagree. We review an unpreserved issue regarding jury instructions for plain error. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

The trial court twice read the jury instruction for first-degree child abuse, CJI2d 17.18, once as the predicate felony for the felony-murder charge, and again for the separate charge of first-degree child abuse. The trial court instructed on CJI2d 3.9 (specific intent) for the separate count of first-degree child abuse, but not for the predicate felony. However, our Supreme Court recently held that when CJI2d 17.18 is given, "it is unnecessary for the jury to be given further instruction on 'specific intent,' such as that found in CJI2d 3.9." *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004). The Court noted that "[t]he need to draw the common-law distinction between 'specific' and 'general' intent is not required under the plain language of the [first-degree child abuse] statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm." *Id.* at 296. The Court reasoned that CJI2d 17.18 alone properly directs the jury to such an analysis. *Id.* Thus, defendant's argument is without merit. With respect to potential confusion by the jury, we fail to see any possible harm to defendant because, if the jury considered the instruction under CJI2d 3.9, it did not result in lowering the prosecutor's burden of proof and arguably, if anything, made it more difficult to obtain the convictions, and if the jury did not consider CJI2d 3.9, it would be consistent with *Maynor* as the reading of CJI2d 17.18 was sufficient to protect defendant's rights. Reversal is unwarranted.

Defendant next argues that defense counsel provided ineffective assistance to defendant because she did not object to the jury instructions for first-degree child abuse as discussed above. However, we declined to assign error regarding the trial court's instructions to the jury. Thus, any objection by defense counsel would have been without merit. A failure to make a meritless

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the "same elements" test proscribed in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) [the *Blockburger* test]. *Nutt, supra* at 596. However, the Court specifically noted that it was not addressing the "multiple punishments" portion of the Double Jeopardy Clause, and it is that portion that is involved here. *Id.* at 575 n 11.

[2] Although we have vacated the conviction and sentence for first-degree child abuse, instructions on the crime remain relevant as first-degree child abuse formed the underlying basis of the conviction for felony murder.

objection does not constitute ineffective assistance of counsel. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also argues that defense counsel was ineffective because she failed to object to some of the prosecutor's statements made during closing arguments. Defendant contends that the prosecutor expressed a personal belief in defendant's guilt, which constituted misconduct that denied defendant a fair trial. The record shows that the prosecutor's statements were properly based upon the evidence presented at trial. See *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995) (prosecutor may argue the evidence and reasonable inferences arising from the evidence). Thus, an objection to those statements would have been without merit and defense counsel was not ineffective for failing to make it.

Defendant next argues that the felony-murder statute, MCL 750.316(1)(b), is subject to a judicial limitation set forth in *People v Pavlic*, 227 Mich 562, 565-566; 199 NW 373 (1924), that the felony-murder rule applies to only those felonies that are inherently or foreseeably dangerous to human life. We find that defendant's reliance on *Pavlic* is misplaced because that case does not even involve the felony-murder rule and has no applicability to it. Furthermore, in *People v Aaron*, 409 Mich 672, 727; 299 NW2d 304 (1980), our Supreme Court stated, "The enumerated felonies are not necessarily inherently dangerous to human life." The Court interpreted Michigan's first-degree murder statute as "enumerat[ing] felonies solely for the purpose of elevating the degree of murder committed in the perpetration or attempted perpetration of those felonies." *Id*.; see also *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995).

Defendant also contends that his felony-murder conviction should be vacated because his conviction of murder and the predicate felony of first-degree child abuse arose from the same act, multiple blows to the head and body of the twenty-three-month-old victim, thus there is no independent felony supporting the felony-murder rule. Defendant acknowledges that in *People v Magyar*, 250 Mich App 408, 410; 648 NW2d 215 (2002), this Court upheld a felony-murder conviction with first-degree child abuse as the predicate felony under comparable factual circumstances. However, defendant suggests that this Court should not follow *Magyar*. He presents a strained analysis in an attempt to distinguish *Magyar*. Defendant also contends that in *Magyar*, this Court erroneously relied upon *Jones, supra*, because the defendant in *Jones* committed two separate and distinct felonies, breaking and entering, and murder.

Defendant cannot distinguish the present case from *Magyar*. Regardless of how it is framed, when defendant's argument is reduced to its core premise, the argument is identical to that made by the defendant in *Magyar*, which we are bound to follow under MCR 7.215(J). In *Magyar*, *supra* at 411, this Court noted the discussion in *Jones* regarding the purpose behind MCL 750.316(1)(b) of graduating punishment and raising an already-established murder to first-degree status. The Court also noted that the language of the statute "'clearly allows all murder committed in the perpetration or attempted perpetration of the enumerated felonies to be treated as first-degree murder.'" *Id*. at 412, quoting *Jones, supra* at 215. Finally, the *Magyar* panel stated that the statute "'makes no distinctions for the commission of enumerated felonies with assaultive intent against the murder victim.'" *Magyar, supra* at 412, quoting *Jones, supra* at 215. Thus, defendant's argument that the predicate felony merged with the murder fails. In addition, defendant's arguments that MCL 750.316(1)(b) violates his constitutional right to due process and equal protection, and that the statute is void for vagueness, which arguments are all predicated on acceptance of defendant's rejected "merger" theory, also fail for the reasons stated

above; the felony murder statute is legally sound as is defendant's conviction for first-degree felony murder.

Affirmed in part, vacated in part. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello